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BALLOT PROPOSITIONS AND CAMPAIGN FINANCE REFORM

RICHARD BRIFFAULT

For more than two decades, law and policy in the area of campaign finance reform have been framed by the conflict between the norms of promoting political equality and protecting political participation. Viewing campaign finance as a basic component of political activity, the Supreme Court has generally given political participation priority over equality and has invalidated reforms that would limit spending in order to promote equality.¹ The Court, however, has sustained some restrictions on campaign finance activities of candidates, political parties, and individuals and groups who work with these political professionals.² In effect, concern about the capacity of private donations to corrupt officeholders has mediated some of the tension between speech and equality and has provided a justification for some reforms, such as disclosure rules and contribution limits. As the 1996 election demonstrated, however, these efforts at reform have had relatively little effect in stemming the flow of special interest money into candidate and party coffers.³

Like campaign reform, the ballot initiative is intended to weaken the power of special interests over government. Instead of reducing the power of monied interests over elected officials, the

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1. See *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309 (1996); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 1, 49, 56-57 (1976). But see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

2. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976) (upholding limits on contributions to candidates and parties); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981) (upholding limitations on contributions to political committees).

3. See, e.g., Rebecca Carr, *As Soft Money Grows, So Does Controversy*, 54 CONG. Q. WKLY. REP. 3272 (Nov. 16, 1996); Peter Stone, *The Green Wave*, 28 NAT'L J. 2415 (Nov. 9, 1996); Jonathan D. Salant, *Special Report: Finances Take Priority in This Year's Races*, 54 CONG. Q. 3081 (Oct. 26, 1996).

initiative curtails the role of elected officials by enabling the people to make law directly, thus bypassing the corruptible legislature. Yet today, as Professor Raskin demonstrates,⁴ the campaign finance inequalities that characterize candidate elections mark initiative elections, too. However hard true campaign finance reform has been—and continues to be—in the candidate context, it will be even more difficult to achieve in ballot proposition elections.

The hallmark of direct democracy, and particularly of voter-initiated measures,⁵ is the absence of candidates and party labels from election campaigns. Initiative campaigns are typically mounted by private individuals or groups, with many of the campaign committees organized on an ad hoc basis to support or oppose a particular proposition. The Supreme Court has been, so far, unwilling to accept limits on the campaign finance activities of private interests, however monied they may be. Therefore, the centrality of nonpoliticians to initiative elections makes it more difficult to secure reforms that limit the role of private money in ballot initiative elections. Even if doctrine were to change to permit greater regulation of campaign money in ballot proposition campaigns, the relatively open nature of direct democracy would still make it more difficult to implement many reforms—not just contribution and expenditure limits but also the provision of public funds that would reduce the influence of private interest money.

I

THE BASIC ELEMENTS OF CAMPAIGN FINANCE REGULATION

The campaign finance area is shaped by the interplay of three concerns: electoral communication, equality, and corruption. First, meaningful elections presume extended political communication.

4. See Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393, esp. at 394 ("corporatization of direct democracy").

5. The broad term "direct democracy" includes three voting mechanisms: the "initiative" permits a group of voters to initiate a law or a constitutional amendment by placing a proposal on the ballot which is then submitted to the electorate for approval or rejection; the "referendum" refers a proposed law to the voters for approval or rejection after the legislature has acted; and the "recall" allows voters to force a popular vote on whether an elected official is to be removed from office before the conclusion of his or her term. Initiatives and referenda together are referred to as "ballot propositions." See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 2 (1989). This Comment focuses primarily on the "initiative," which permits popular lawmaking directly without any involvement of elected officials.

Candidates and others with an interest in the outcome of an election need to be able to communicate their views to the voters. More importantly, the legitimacy of decision-making by election—what Professor Raskin calls a “[bet] on the enlightenment of the majority of [the] people”⁶—turns on the ability of voters to receive the information they need to cast informed votes. Money is central to the dissemination of information concerning candidates and issues. Money is certainly not speech, but in a large and heterogeneous society it takes a considerable amount of money for anyone interested in an election to communicate with the voters. Therefore, the goal of protecting and promoting the dissemination of political communication militates against restrictions on campaign finances.

As a constitutional matter, the Supreme Court has determined that government regulation of campaign money must be subject to “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”⁷ Moreover, as a policy matter, limits on campaign contributions and spending raise the danger of limiting the information, ideas, and opinions available to the voters—unless the limits are supplemented by public funds, publicly provided communications, or regulations that reduce the cost of campaigns.

Second, a central goal of campaign finance reformers has been political equality.⁸ In this context, equality has had two meanings. One emphasizes the equal treatment of opposing candidates or opposing sides in a ballot proposition election. As a basic element of electoral fairness, candidates and opposing points of view should be able to contest elections with each other on a relatively equal basis. If one candidate, or one side in a ballot proposition election, spends far more than the other, the voters are likely to hear far more information from the former than the latter. This smacks of unfairness and casts doubt over whether the electorate’s decision is a properly informed one.⁹

The other strand of equality concerns the equal influence of voters on electoral outcomes. Each voter has just one vote. But if

6. Raskin, *supra* note 4, at 402.

7. *Buckley*, 424 U.S. 1, 44 (1976).

8. *See, e.g.*, John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 382 (1985).

9. *See, e.g.*, Raskin, *supra* note 4, at 400; Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experiences, Public Choice Theory, and the First Amendment*, 29 UCLA L. REV. 505, 515 (1982).

monied interests spend hundreds of thousands of dollars in connection with campaigns, these interests may have a greater influence on the outcome of elections than those with fewer dollars to spend. Drawing on an analogy to the "one person, one vote" rule in legislative apportionment, some commentators have urged an "equal-dollars-per-voter" principle to equalize the financial influence of voters on election outcomes.¹⁰

The two versions of equality do not necessarily go together. In an election in which one side starts out with far more popular support than the other, "equal-dollars-per-voter" could result in wildly unequal spending if each voter were empowered to make an equal financial contribution and then gave money to the side that enjoyed the voter's initial support. Conversely, equal financing of candidates or opposing positions in a ballot election could be achieved by a small number of wealthy donors bankrolling each candidate or side. Nor is money the only factor that ought to be considered in appraising candidate equality. In many elections one candidate—the incumbent—starts out far better known, with greater access to the media, and with the opportunity to use government resources to his or her advantage. Thus, limiting spending in the name of equalization may make it more difficult for challengers to take on incumbents.¹¹ Nonetheless, these notions of candidate equality and equality of influence over electoral outcomes have strong claims in our political culture and lie behind many reform proposals.

Third, campaign finance may affect the behavior of government after or, more accurately, between elections. When most candidates are dependent on private donations, large donors and prospective large donors may enjoy special leverage over elected officials. Donors can obtain special access to officeholders, and their views may carry extra weight. They will, therefore, be particularly well positioned to affect legislation and regulation. This is less a matter of outright bribery or formalized deals, and more a matter of the subtle ways in which big donors may make their interests known and their influence felt. Such special interest influence is difficult to measure, detect, or police. To the extent that depen-

10. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

11. Although equalized spending could limit the ability of little-known challengers to catch up with well-known incumbents, this problem tends to be more theoretical than real. In most elections, the incumbent is able to raise and spend far more money than challengers. See, e.g., HERBERT E. ALEXANDER & ANTHONY CORRADO, *FINANCING THE 1992 ELECTION* 195-96 (1995).

dence on large private donations causes an officeholder to place donor interests ahead of public interest in the course of his or her discharge of official duties, large private donations are a source of corruption.

It has been suggested that the prevention of corruption is not a distinct concern but is, instead, merely "derivative" of the deeper question of inequality.¹² Certainly, the existence of great inequalities of wealth means that some people or interests have the capacity to "corrupt" officeholders while others do not. The possibility of outspending the opposition—and the fear that the opposition will outspend one's own candidacy—drives the feverish pursuit of potentially corrupting private contributions. Rhetorically, the concerns of "inequality" and "corruption" may be melded by language that speaks of the corrupting effect of special interest spending on the political process as a whole.

Nevertheless, the concern about candidate corruption addresses a problem different from that posed by either unequal campaign spending or unequal influence over electoral outcomes. I suspect that what bothers voters about the fund-raising scandals that rocked the final weeks of the 1996 presidential campaign¹³ was not the possibility that illicit donations gave President Clinton an unfair advantage over Bob Dole or Ross Perot, or gave Clinton's donors an undue influence over the outcome of the election. Rather, voters are concerned that donors won private meetings with the President and other members of his administration, with the possibility of unspecified benefits and favors in return for their funds.¹⁴ There is a natural apprehension that the President may have made certain decisions based on the donors' interests rather than his own conception of the public interest—in other words, that he was "corrupted."

In fashioning doctrine in this area, the Supreme Court has given primacy to the value of electoral communication. Starting with *Buckley v. Valeo*,¹⁵ the Court has developed campaign finance case law entirely under the rubric of the First Amendment. Pro-

12. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994).

13. See, e.g., Michael Isikoff & Melinda Liu, *Scandal: Now, the Taiwan Axis*, NEWSWEEK, Nov. 4, 1996, at 32; Howard Feinman & Mark Hosenball, *The Asian Connection*, NEWSWEEK, Oct. 28, 1996, at 24-28.

14. Similar concerns have been raised by the fund-raising practices of Congressional Republicans. See Don VanNatta, Jr. & Jane Fritch, *\$250,000 Buys Donors Best Access to Congress*, N.Y. TIMES, Jan. 27, 1997, at A1.

15. 424 U.S. 1 (1976).

ceeding from the assumption that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,"¹⁶ the Court has subordinated political equality in order to protect unfettered campaign communication in almost every case in which the two values conflict.

The Court, however, has recognized that the prevention of corruption can provide a basis for some campaign finance regulation. In a sense, the notion of "corruption" has mediated the conflict between unlimited spending by monied interests on political communication and the goal of greater political equality in a Court bent on preferring the former to the latter. When the Court is persuaded that a campaign finance practice raises a question of private interest corruption of officeholders, it may sustain a restriction.¹⁷ Thus, the Court has upheld limitations on the amount of money a donor can give to a candidate, to all candidates in an election cycle, and to organizations that give donations to candidates.¹⁸ Such contributions may be restricted because they do not directly entail the expression of political views¹⁹ and because they raise the danger of corruption: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."²⁰

16. *Id.* at 48-49.

17. *See, e.g., id.* at 26-29.

18. *See id.* at 23-38; *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981) (upholding certain limitations on donations to political committees for multiple candidates). Although an individual's contribution to a political action committee raises little question of the donor's corruption of that organization, such donations may be restricted to prevent donors from using intermediary organizations to avoid limits on contributions to candidates.

19. *See Buckley*, 424 U.S. at 21. According to the Court, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* The expressive component of a contribution "rests solely on the undifferentiated, symbolic act of contributing." *Id.* In contrast, the size of the contribution "does not increase perceptibly" with the quantity of the contributor's communication. *Id.* "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

20. *Id.* at 26-27. The Court has also upheld reporting and disclosure requirements, reasoning that they may provide voters useful information concerning candidates' financial backers and discourage corruptive donations, without actually limiting campaign communications. *See id.* at 64-68. Where a minor political party can demonstrate that reporting and disclosure requirements may chill contributions that do not present dangers of corruption, the Court has been willing to

By contrast, spending on direct communications with voters has been held to entail core political speech.²¹ When undertaken by candidates directly, or by noncandidates acting independently of a candidate's campaign, such spending has been held to present no danger of corrupting candidates.²² The justifications for restricting such expenditures are egalitarian—to equalize the influence of candidates and interest groups on electoral outcome—and those have been deemed insufficient to support a restriction on campaign finance activities.²³ As a result, the Court has invalidated restrictions on spending by candidates²⁴ and independent committees,²⁵ including party committees acting independently of their candidates.²⁶

The one exception to the general hostility to expenditure restrictions occurred in 1990 in *Austin v. Michigan Chamber of Commerce*,²⁷ in which the Court upheld a state law restricting expenditures by business corporations in connection with a candidate election. The Court found that a state could justify such a law as necessary to control “the corrosive and distorting effects of immense aggregations of wealth” which could “unfairly influence elections when . . . deployed in the form of independent expenditures.”²⁸ *Austin* hinted at a broader notion of corruption—not just that private donations might corrupt candidates, but that unlimited corporate spending aimed at influencing electoral outcomes might corrupt the integrity of the political process itself.

The significance of *Austin*, however, is limited by the Court's focus on the assertedly unique dangers posed by corporations. According to the Court, corporations enjoy a unique state-conferred

invalidate the application of those requirements to the organization. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

21. See *Buckley*, 424 U.S. at 19-20.

22. See *id.* at 47, 51-55; *Federal Election Comm'n v. National Conservative Pol. Action Comm.*, 470 U.S. 480 (1984).

23. See *Buckley*, 424 U.S. at 48-49 (rejecting the equalization of the relative abilities of individuals and groups to affect electoral outcomes as a basis for limiting spending); *id.* at 56-57 (rejecting the equalization of the financial resources of candidates as a basis for limiting spending).

24. See *id.* at 51-54 (invalidating limits on candidates' use of personal or family wealth); *id.* at 54-58 (invalidating limits on candidates' use of campaign expenditures).

25. See *id.* at 39-51.

26. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309 (1996).

27. 494 U.S. 652 (1990).

28. *Id.* at 660.

status that enables them to accumulate large sums of money.²⁹ Limits on corporations are justifiable "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . . [are not] converted into political 'war chests'. . . ."³⁰

Austin and business corporations³¹ aside, the Court in its decisions³² has generally distinguished the prevention of corruption from the promotion of equality. The Court has also defined corruption in terms of the favors that donors may obtain from officeholders rather than the undue influence monied interests may have over electoral outcomes. Under the current constitutional regime, the only ways to promote equality in spending are: the provision of public funds to candidates or voters; regulation of media advertising rates to reduce campaign costs; or other government programs that might disseminate election information and thereby indirectly assist candidates with fewer financial resources. Candidates may be required to limit their expenditures as a condition for the receipt of public funds—although candidates cannot be required to accept public funds and the attendant spending limits. Even the provision of public funds to candidates cannot provide a basis for the imposition of limits on spending by independent committees.³³ With electoral communication at the heart of the Court's campaign finance jurisprudence, equality may be promoted by "leveling up" the resources available to less affluent candidates or voters but not by "leveling down" the ability of monied interests or individuals to devote their own financial resources to elections.

29. *See id.* at 659-60.

30. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982).

31. In *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court held that restrictions on corporate political activity could not constitutionally be applied to entities that, although corporate in form, were organized for ideological purposes and did not garner their funds from business activities. *See id.* at 263-64.

32. In dicta in other cases, the Court, or individual justices, raised the possibility that the undue influence accruing to monied interests may constitute "corruption." *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 301 (1981) (Marshall, J., concurring); *id.* at 302-03 (Blackmun, J. and O'Connor, J., concurring). In neither case did the Court find evidence of such undue influence.

33. *See Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1984).

II

BUCKLEY V. VALEO AND CAMPAIGN FINANCE
REFORM IN ELECTIONS WITHOUT
CANDIDATES

The Supreme Court set the terms for campaign finance regulation in the ballot proposition context in two leading cases,³⁴ *First National Bank of Boston v. Bellotti*³⁵ and *Citizens Against Rent Control (CARC) v. City of Berkeley*.³⁶ In *Bellotti*, the Court invalidated a state law barring corporations from engaging in campaign expenditures in connection with a ballot proposition.³⁷ In *CARC*, the Court invalidated limits on contributions to campaign committees in ballot proposition elections.³⁸ *Bellotti* and *CARC* suggest that, for the Court, ballot proposition elections are categorically different from candidate elections for campaign finance purposes since restrictions similar to those invalidated in these two cases have been upheld in the candidate context. *Austin* sustained restrictions on corporate spending in a candidate election, and *Buckley* upheld limits on contributions to candidate campaign committees.³⁹ The Court's hostility to restrictions on either contributions or direct expenditures in the initiative context follows from the logic of *Buckley*.⁴⁰

Ballot proposition elections differ from other elections: candidates and party labels are absent from the ballot, replaced by proposed statutes and constitutional amendments. This eliminates potential corruption of officeholders as a justification for imposing limitations on campaign finance activities. At the same time, it increases the value of information contained in campaign communications for voters.

Donations to committees that mount ballot proposition campaigns raise little danger of corrupting officeholders, as such com-

34. A third case dealing with the role of money in direct democracy is *Meyer v. Grant*, 486 U.S. 414 (1988), in which the Court invalidated a Colorado law forbidding the use of paid circulators for initiative petitions. *Meyer* is entirely consistent with the anti-restriction thrust of the other leading cases, but since it deals with the process by which initiative measures are placed on the ballot rather than the initiative election campaign itself, *Meyer* will not be discussed here.

35. 435 U.S. 765 (1978).

36. 454 U.S. 290 (1981).

37. See *Bellotti*, 435 U.S. at 767.

38. See *Citizens Against Rent Control*, 454 U.S. at 299-300.

39. See also *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981) (upholding restrictions on contributions to political action committee formed to give contributions to candidates).

40. 424 U.S. 1 (1976).

mittees are generally organized and run by private citizens and do not involve elected representatives. A particular ballot proposition campaign may, of course, serve the electoral interests of a particular candidate, and monied interests may on occasion be able to create political debts by spending in connection with a direct democracy election.⁴¹ But such campaigns are uncommon. Candidates for office and political parties generally play little or no role in ballot proposition elections.⁴² Thus, donations to initiative campaigns, or direct expenditures in connection with ballot propositions, rarely pose a danger of corrupting elected officials since there is no one to corrupt in such elections.⁴³

By the same token, the absence of candidates and parties increases the importance of campaign communications. In candidate races, the voter often enters the election season with some knowledge about the candidates. There is usually an incumbent whose record of voting decisions, official actions, personality, character, and, increasingly, private life have been the subject of media reports. The challenger may also be an officeholder or a locally prominent person whose public and private activities have received media coverage. Voters are likely to have some sense of the well-being of the community during the incumbent's tenure, which can be used as a basis for deciding whether or not to return the incumbent to office. Even when the voter knows little about the candidate's record, the candidate's name may tell the voter something—such as ethnicity or sex—that may be relevant to the voting decision. Additionally, candidates are usually the nominees of parties. Many voters are registered in parties, and party nomination may be important in their voting decisions. Even for independent voters, the candidate's party affiliation is an important "cue," suggesting to them what a candidate's views are likely to be on a range of issues. This information—incumbency, past performance, character, party, and ethnic identity—supplied either by the ballot itself and/or by the media in the years preceding the election, is missing when initiatives are on the ballot.

41. See Shockley, *supra* note 8, at 386.

42. See, e.g., BETTY H. ZISK, MONEY, MEDIA, AND THE GRASSROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 102, 161 (1987).

43. In addition, the absence of candidates eliminates the argument that expenditure restrictions may be justified as protecting representatives from the diversion of their time from official duties to fundraising. For a forceful development of this argument, see Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

Yet, even as voters enter the election season with less information about ballot propositions than about candidates, they need to know much more. In candidate elections, voters are asked to decide who is to hold a particular office for a term. The voters need not resolve any particular dispute over public policy; their elected representatives will do that for them. They must, however, decide which candidate is to be entrusted with authority to act and base this decision on a general appraisal of the candidate's competence, ideology, past behavior, character, and other factors. By contrast, ballot propositions involve the direct resolution of legislative or constitutional issues. Indeed, the question before the voters is not simply a matter of setting general policy guidance—such as whether or not to cut taxes, curtail affirmative action, or regulate insurance—but is a very specific, often quite technical, and frequently ambiguous proposal.⁴⁴ A ballot question dealing with taxes requires the voter to decide whether to limit a specific tax, at a specific level, and with a specific provision for waiver.⁴⁵ Similarly, an insurance reform initiative requires consideration of a complex set of rules governing insurance terms and conditions. In many campaigns, determining exactly what the proposition provides may be an issue. For example, in the 1996 vote on term limits in New York City, the issue was not whether to have term limits, but how many terms a city council member could serve; when the limits would take effect; and whether the ballot proposition would stagger term limits to avoid the imposition of term limits on all council members at one time.⁴⁶

Admittedly, some ballot questions are relatively straightforward and involve matters about which most voters have strongly held beliefs that predate the election campaign. In those elections, campaign communications may not play an important role. But such elections are the ones least in need of finance reform.

More frequently, the ballot question will be complex and the public's views unfocused. In these cases, the electorate will need a

44. As a leading scholar of direct democracy has pointed out, "because ballot propositions often deal with complex issues, it is important to differentiate between the voters' knowledge about the broad issue involved and their knowledge about the proposition itself." DAVID MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 140 (1984).

45. As Zisk notes, "an amazing number" of ballot propositions concerning taxes "dealt with highly specific subjects, such as tax exemptions for swine (Georgia), urban renewal (Florida and Virginia), disabled veterans (Virginia), and solar energy (Georgia and Nebraska)." Zisk, *supra* note 42, at 18.

46. Paul Moses, *Term Limits Making Repeat Appearance*, N.Y. TIMES, Oct. 29, 1996, at A7.

great deal of very specific information in order to cast informed ballots. The major sources of information are likely to be individuals and organizations interested in persuading the voters to support or oppose the proposition. Very little information comes from neutral sources. Unlike candidate elections, in which a candidate's name and party affiliation may provide voting cues, the ballot itself provides little information.⁴⁷ Media analysis of ballot measures is usually skimpy.⁴⁸ As one scholar has noted, "media coverage, even in good state newspapers, is typically thin and late."⁴⁹ Endorsements by public officials and other prominent figures can give the voters some guidance, but for many initiatives, public officials strive to avoid taking a stand.⁵⁰ Similarly, the political parties rarely become involved in ballot proposition contests.⁵¹ Although many states provide voters with pamphlets or handbooks summarizing the initiatives and presenting brief "pro" and "con" arguments, most analysts have concluded that voter pamphlets fail to provide much useful information to the majority of voters.⁵²

As a result, voters in direct democracy elections are highly dependent on the communications of campaign participants for the information that will enable them to decide how to vote.⁵³ Under these circumstances, the burden on those who would limit campaign contributions and expenditures is particularly heavy.

Some commentators have tried to minimize the communicative value of the ads characteristic of ballot proposition campaigns.

47. Indeed, in some states the proposition itself does not appear on the ballot. See Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot: Initiative Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 94-95 (1995) (noting that in Colorado, neither a summary nor the language of the initiative appears on the ballot).

48. See ZISK, *supra* note 42, at 153; MAGLEBY, *supra* note 44, at 158-65.

49. CRONIN, *supra* note 5, at 83.

50. ZISK, *supra* note 42, at 102-03.

51. Zisk refers to the "near-irrelevance of parties for state ballot controversies." ZISK, *supra* note 42, at 238. In her survey of 72 ballot proposition measures in four states over a six-year period, she found that partisanship played a role in only two cases, one of which was a referendum on reapportionment initiated by the California Republican party. See *id.* at 237.

52. See, e.g., ZISK, *supra* note 42, at 153 ("[T]he ballot pamphlets . . . are written at a level beyond the ready comprehension of the average reader."); MAGLEBY, *supra* note 44, at 136-39; Lowenstein, *supra* note 9, at 604-06. But cf. CRONIN, *supra* note 5, at 80-82 (finding voter pamphlets useful to many voters, but acknowledging the need for better design and preparation).

53. See, e.g., CRONIN, *supra* note 5, at 83, 120; MAGLEBY, *supra* note 44, at 168 ("[I]n the absence of the party cue, voters are more dependent on the two sides to simplify the choice and help organize the electoral decision.").

Scholars of direct democracy have repeatedly asserted that campaign communications have been "deceptive, superficial, [or] irrelevant,"⁵⁴ with more attention devoted to "peripheral and indeed distracting issues"⁵⁵ than to the content and likely impact of the proposition on the ballot. This is not simply attributable to a lack of funds. Well-funded campaigns are often the worst offenders, bombarding voters with information that is simplistic, confusing, and sometimes "deliberately misleading."⁵⁶ In fact, additional spending often merely compounds voter confusion.⁵⁷ Even in the absence of restrictions on initiative campaign spending, most voters enter the voting booth ill-informed about the questions on the ballot.⁵⁸ A sizable percentage of voters actually cast mistaken ballots—voting for the position that is contrary to their policy preferences.⁵⁹

Indeed, in reviewing literature on the subject, it seems that the critics are often more concerned with the confusing and deceptive quality of the messages disseminated by well-funded campaigns than with the inequality in spending per se. This creates the implication that the only problem with spending inequalities is their facilitation of deceptive ads.⁶⁰ Professor Lowenstein has suggested that heavy, one-sided spending is able to rely on deception only because the other side lacks funds to rebut misstatements.⁶¹ However, Professor Zisk has shown that campaigns in which both sides are equally endowed are just as likely to "degenerat[e] into confusion and deception."⁶² "[T]wo heavy spenders may simply cause twice the confusion of one rather than one forcing the other to confront the real issues."⁶³

Whether or not one-sided spending is primarily associated with deceptive campaigning, it is hard to see how the poor quality of ballot campaign ads provides a basis for reducing the constitutional status of initiative campaign speech. Ballot proposition ads may be more confusing than enlightening, but, so long as they refrain from degenerating into outright falsehoods, they should continue to enjoy constitutional protection. Reference to their poor quality will

54. Lowenstein, *supra* note 9, at 517.

55. ZISK, *supra* note 42, at 131.

56. *Id.* at 246.

57. *Id.* at 136.

58. See, e.g., Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1516 (1990).

59. See *id.* at 1517; CRONIN, *supra* note 5, at 74.

60. See, e.g., Lowenstein, *supra* note 9, at 611.

61. *Id.* at 517.

62. ZISK, *supra* note 42, at 131.

63. *Id.* at 154-55.

do little to bolster the case for regulation; indeed, to the extent that the desire to limit the amount of spending is driven by a concern about ad content, the possibility of sustaining spending restrictions may actually be reduced. Of course, even unlimited spending may do little to educate voters as to what the real issues are in a particular ballot measure. But, given the voters' enormous need for more information, it would be difficult to come up with a "speech" basis for limiting even one-sided campaign spending.

With candidate corruption unavailable as a justification for regulation in this area, and the need for information just as strong in the initiative-elections context, the case for restrictions on ballot proposition campaign financial activities must rest entirely on egalitarian concerns. Both the issues of unfair contests and undue influence of monied interests are present in the ballot-proposition context. Moreover, due to the absence of candidates and parties, unequal spending may play a greater role in affecting electoral outcomes for initiatives than for candidates.⁶⁴ This is the flipside of the important role played by campaign communications in initiative elections. If campaign communications matter more, then differences in the amount of communications, reflecting differences in the level of financial support for each side, should have a greater impact on electoral outcomes.

Of course, money is not always dispositive in either candidate or initiative elections. Long standing opinions, grass-roots interest groups, campaign strategies,⁶⁵ even the placement of the measure on the ballot⁶⁶ and the number and content of other ballot pro-

64. See, e.g., CRONIN, *supra* note 5, at 83, 215. Professor Lowenstein asserts that the disparities in ballot measure elections are much greater than in candidate elections. This is due, he suggests, to the absence of parties and the standing support that both parties are likely to enjoy, and to the absence of an "investment incentive" for interest groups to donate to both sides in a ballot proposition fight. In candidate elections, many interests groups are concerned less with which candidate wins and more with having access to the ultimate winner once he or she takes office. Consequently, these groups may contribute to more than one candidate. By contrast, in an initiative election, there is no question of access to the winner. If a person or organization has an interest in the election, it will be on only one side of the issue. See Lowenstein, *supra* note 9, at 589 & n.314.

Although Professor Lowenstein's notion of the absence of an investment incentive in initiative elections seems sound, his data does not demonstrate that one-sided spending is more common in initiative than in candidate elections. In addition, his analysis does not take into account the many candidate races, such as those involving incumbents from "safe" districts and/or holding powerful committee chairmanships, in which interest groups "invest" in only one side.

65. See CRONIN, *supra* note 5, at 99-100.

66. See Shockley, *supra* note 8, at 397-98.

positions⁶⁷ can affect the fate of a particular ballot measure. Nevertheless, when a ballot question deals with a matter about which most voters lack strongly held views, then, in the absence of party cues and candidate factors, campaign expenditures are likely to have a larger impact in initiative elections.⁶⁸

Unequal spending appears to affect initiative elections differently than candidate elections. Some critics of spending limits in candidate elections have asserted that limits are pro-incumbent because they can prevent challengers from amassing the funds needed to take on entrenched incumbents;⁶⁹ in practice, however, incumbents typically outraise and outspend their challengers.⁷⁰ Spending inequality in candidate races tends to reflect and reinforce the advantages incumbents enjoy, compounding rather than offsetting the incumbency bias characteristic of many American elections. It is this incumbency bias, more than spending inequality per se, that frequently erodes the fairness of elections. Indeed, spending inequality in candidate elections raises the special danger that officeholders will be able to perpetuate themselves in power.

In initiative elections, by contrast, spending inequality does not seem to correlate with one side or the other; that is, there is no evidence that "yes" votes typically outspend "no" votes or vice versa. Instead, the significance of spending inequality appears to turn on whether one is substantially outspending the other. Heavy spending in favor of a proposition does not make it much more likely that the proposition will pass; heavy spending on the negative side does make it much more likely that the measure will fail.⁷¹

Heavy one-sided negative spending seems to reinforce a modest general "negative bias in initiative voting."⁷² Voters tend to defeat more voter-initiated measures than they approve, reflecting perhaps a basic conservatism and resistance to change.⁷³ The propensity to vote "no" on initiatives seems to be more modest than the

67. See ZISK, *supra* note 42, at 107.

68. In Zisk's study, "campaign expenditures are the single most powerful predictor of the vote." *Id.* at 90.

69. See, e.g., DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM* 162, 171-73 (1990).

70. See, e.g., ALEXANDER & CORRADO, *supra* note 11, at 192, 195.

71. See Lowenstein, *supra* note 9; CRONIN, *supra* note 5, at 109; Shockley, *supra* note 8, at 397-98.

72. MAGLEBY, *supra* note 44, at 167.

73. See David R. Lagasse, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347, 1395 (1995).

propensity to re-elect incumbents in candidate elections,⁷⁴ but there is no particular propensity across ballot measures for one side, such as the "no" side, to raise more money than the other.

Unequal spending in candidate elections tends to result in the return of incumbents to office, whereas unequal spending in initiative elections tends to result in an increase in the number of ballot propositions defeated. It could be argued that both consequences subvert the election in question. The possibility of being voted out of office is intended to make officeholders more responsive to their constituents, or to enable their constituents to replace incumbents who diverge too far from constituent preferences. The initiative was intended to enable the electorate to circumvent the legislature—and the monied interests who were believed to dominate the legislature—and make law directly.⁷⁵ Heavy one-sided negative spending makes it more difficult for initiative proponents to get their measures enacted into law or added to their state constitutions. To that extent, one-sided spending can frustrate the very purpose of the initiative.

Yet, the American tradition has placed the highest priority on restraining public power and preventing tyranny. By reinforcing the power of incumbency, unequal spending in candidate elections threatens the very bedrock of democratic self-government—the ability of the people to vote officeholders out of office. By contrast, one-sided negative spending resembles one-sided legislative lobbying—it skews the political process for the benefit of those with great wealth, but it does not strengthen the ability of those in office to hold power. Given the skepticism of some critics about the wisdom of voter-initiated legislation,⁷⁶ reducing the number of initiatives passed might not be such a bad thing. I doubt, however, that even critics of the initiative think that one-sided negative spending is the best way to screen out undesirable initiatives. The power of one-sided, negative spending to defeat initiatives is really a restatement of the inequality concern—that monied interests have undue influence over electoral outcomes, even if only on the negative side. The extra factor present in candidate elections—that unequal

74. See, e.g., Lowenstein, *supra* note 9, at 550 (observing that of 26 California initiatives studied, seven, or 27% were approved, and 19, or 73% were defeated; only 38% of initiatives that benefited from significant one-sided spending passed, although even fewer (11%) of initiatives opposed by significant one-sided spending passed).

75. ZISK, *supra* note 42, at 193.

76. See Eule, *supra* note 58.

spending reinforces the power of officeholders—is absent in the initiative setting.⁷⁷

Even if the consequences of unequal initiative spending leading to the defeat of more initiatives were taken to be as serious as the consequences of unequal candidate spending reinforcing the power of incumbency, the latter concern has not yet been a basis for judicial validation of campaign finance limits. So long as candidates are formally equal in the ability to raise and spend money, the Court has not recognized that the campaign finance system favors one candidate over another or that it undermines the utility of elections in keeping officeholders accountable to the electorate. That being the case, it is unlikely that the Court would be moved by a showing that the potential for one-sided negative spending will make it harder for initiative measures to be adopted.

Given the absence of the concern over candidate corruption, ballot propositions pose a sharper instance of the conflict between speech and equality than candidate elections. Since *Buckley*, conflicts between speech and equality have generally been resolved against equality.⁷⁸ *Austin* may provide a basis for more rigorous campaign finance regulation by broadening the notion of corruption to include not simply the impact of donations on candidates, but also the undue influence monied interests can wield over electoral outcomes.⁷⁹ But *Austin*'s significance for promoting campaign reform in the ballot proposition context is limited for three reasons.

First, *Austin* appears to be a rule for candidate elections only, given *Bellotti*'s prior invalidation of limits on corporate spending in ballot proposition elections. *Austin* did not say much about *Bellotti*, and its concern about the undue influence of money over electoral

77. Moreover, even though one-sided negative spending can limit the ability of the initiative to achieve direct law-making, it is not clear that increasing the number of initiatives defeated completely frustrates the initiative as a mechanism for popular influence over the political process. One-sided negative spending typically occurs only after an initiative measure has actually qualified for the ballot. At that point, the subject of the initiative has been added to the political agenda. Even if the initiative is defeated on election day, the initiative mechanism may have the effect of eventually forcing elected officials to come to grips with the issue that has been the subject of the ballot proposition. See ZISK, *supra* note 42, at 251, 257 (discussing the role of the initiative in enlarging the public agenda and forcing action on topics ignored by the legislature). Given the lack of informed deliberation in many initiative campaigns, the initiative might in fact play a more beneficial role if its principal effect were to broaden the legislative agenda rather than displace the legislature outright.

78. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

79. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668-69 (1990).

outcomes ought to be as applicable to ballot proposition elections as to candidate elections. But *Austin* clearly refrained from overruling the older case.⁸⁰ The two cases together, thus, establish a sharp differentiation of campaign reform jurisprudence based on whether the election concerns candidates or initiatives.

Second, *Austin* authorizes limitations on the spending of corporations only. The role of the state in giving special advantages to corporations was central to the decision's rationale.⁸¹ The Court treated corporations as though they were the recipients of public funds in finding that the state could make the benefits of the corporate form contingent upon limitations on the corporation's political activity. This does not bode well for the extension of *Austin* to other political spenders. Yet corporations are not the only source of unequal initiative expenditures. Labor unions, particularly public employee unions,⁸² trade associations, ideological groups,⁸³ and wealthy individuals have all played important roles in financing ballot proposition campaigns.⁸⁴ Noncorporate spending can be just as

80. *Austin* cited *Bellotti's* prior determination that corporate political speech is protected by the First Amendment. *Id.* at 657. It also cited, without comment, *Bellotti's* prior differentiation of candidate and ballot proposition elections. *See id.* at 659 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

81. *See Austin*, 494 U.S. at 658-59. The logic of *Austin* is quite shaky on this point. In *Bellotti*, its first case dealing with corporate political spending, the Court emphasized that the touchstone for analysis was "[t]he inherent worth of the speech in terms of its capacity for informing the public . . . not the identity of its source, whether corporation, association, union or individual." *Bellotti*, 435 U.S. at 777. The corporate status of the speaker, then, ought to be irrelevant to an assessment of the basis for regulating the speech. In particular, it is hard to see how state-granted advantages make corporate speech more corrupting than political speech by other monied speakers. Moreover, as Justice Scalia pointed out in his *Austin* dissent, corporations are not alone in receiving special advantages from the state. *Austin*, 494 U.S. at 680 (Scalia, J., dissenting). Nor are corporations unique in their ability to divert wealth obtained in the economic marketplace to political purposes. Other business associations, as well as wealthy individuals who benefit from inheritance laws or obtain their wealth through investments in corporations, may build up campaign war chests that have "little or no correlation to the public's support for the[ir] . . . political ideas." *Id.* at 660.

82. *See, e.g., Zisk*, *supra* note 42, at 241; CRONIN, *supra* note 5, at 115. For a recent example of an initiative drive financed primarily by unions, *see Michelle Nicolosi, Even Experts Can't Diagnose HMO Initiatives*, ORANGE COUNTY REG., Nov. 3, 1996, at A22 (describing anti-HMO initiatives financed primarily by service employees international union and California Nurses Association).

83. *See Shockley*, *supra* note 8, at 427 n.197.

84. In New York City, the recent campaign to defeat a ballot proposition that would defer term limits, as well as the earlier campaign that saw a term limits initiative win popular approval, was largely bankrolled by one wealthy individual.

influential as corporate spending in initiative elections.⁸⁵ Indeed, a proscription on corporate spending may have little effect on corporate influence since a corporation may use treasury funds to create a political action committee (PAC) to solicit funds from corporate officers and directors. The corporate PAC may then donate or spend directly to influence an election.⁸⁶

Third, and most importantly, *Austin* is in deep tension with *Buckley*. Although *Austin* used *Buckley*'s language of preventing "corruption," its notion that corruption results from the use of campaign war chests that "have little or no correlation to the public's support for the . . . political ideas espoused"⁸⁷ is really a concern about money-based inequality of influence.⁸⁸ So long as *Buckley* remains the leading case in the field, any effort to extend *Austin* to other wealthy spenders and to initiative elections is likely to run head-on into *Buckley*. Until the conflict between *Buckley* and *Austin* is resolved, *Austin* is unlikely to have much generative power.⁸⁹

The challenge for reformers is to persuade the Court to rethink the campaign finance field along the lines suggested in *Austin*—to focus on the "corruption" of the political process that occurs when money obtained in the domain of private economic transactions is directed without restriction into the political process. Although this is more a question of money-based inequality of influence than corruption as traditionally defined, the rhetoric of corruption may prove to be more effective than arguments phrased in terms of equality. Unless and until *Buckley* is replaced by *Austin*, or by some other approach⁹⁰ that permits restrictions on campaign finance activities for reasons other than preventing the corruption of candidates, there is not much prospect for judicial approval of re-

See Joyce Purnick, *Speak Softly But Carry A Big Wallet*, N.Y. TIMES, Nov. 18, 1996, at B1.

85. See ZISK, *supra* note 42, at 90.

86. See *Austin*, 494 U.S. at 660.

87. *Id.*

88. *Austin* provides little support for limits intended to equalize spending by electoral antagonists. Under *Austin*'s approach, if a candidate or initiative committee received financial support from a large number of donors, there would be no basis for limiting spending even if, without a limit, the opposition would be outspent.

89. In its most recent campaign finance case, *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n.*, 116 S. Ct. 2309 (1996), the Court returned to the *Buckley* approach of defining corruption in terms of the corruption of candidates.

90. Another doctrinal approach would be to devalue campaign expenditures, treating them as less than core political speech and thus as not deserving of the highest level of constitutional protection.

forms that would either limit contributions to initiative campaign committees or would limit the sources or sums of money in initiative campaigns.

III.

THE PROBLEM OF IMPLEMENTATION

Even if campaign finance doctrine was reconceptualized to permit greater restriction on contributions and expenditures, it would still be more difficult to implement reform in the initiative context than in candidate campaigns. Moreover, the most important equalizing reform currently permitted under *Buckley*, public funding, would be difficult to implement in the initiative context. Once again, these difficulties stem from a central feature of initiative elections—the absence of candidates and parties.

In candidate elections, private money flows from donors (either directly or via intermediary organizations) to candidates or parties; from parties to candidates; from the candidates and parties to direct communication to the voters; and sometimes from private parties, also for direct communication to the voters (so-called “independent expenditures”). With the exception of independent expenditures, the candidates and parties are the pivotal nodes in the system. But there are no candidates or parties in the initiative setting. When initiative proponents qualify a measure for the ballot, it is the proposition that goes on the ballot, not the qualifying committee. Yet the proposition per se does not receive or spend money in the general election campaign. Instead, initiative campaigns are conducted by individuals, organizations, and committees with an interest in the outcome but who are not themselves on the ballot. This has implications for the ability to enforce contribution and expenditure restrictions or to supply candidates with public funds.

• *Contribution limits.* Any limit on how much a donor can give to a campaign committee is likely to be meaningless in the ballot-proposition context. If a law were to limit how much an individual could give to a committee, multiple committees would spring up in support of the same position. Unlike candidate elections, in which candidates have to go through an often-onerous process to qualify for the ballot, there are no comparable hurdles restricting the formation of initiative committees. Nor is it clear that a state could limit each side to one committee. In the absence of a ballot-qualified candidate, who is to decide which committee is the one permissible campaign committee? This is particularly true for the “no” side of an initiative. Whereas the organization mounting the petition drive that gets the initiative measure placed on the ballot could

be the designated "yes" committee, there is typically not an official "no" committee. There is certainly no formal process for the designation of an official "no" committee. Although in most initiative campaigns to date there has been just one campaign organization on each side, the history of campaign finance reform indicates that new laws, by creating new incentives, frequently lead to changes in the way campaigns are financed.⁹¹

A state could address this problem by imposing an aggregate cap on all donations in connection with a ballot proposition. But that would simply limit the small and moderate givers. Wealthy interests, professional associations, and firms could simply spend directly on communications with the voters.⁹² In the candidate context, there may be incentives for donors to give directly to a candidate in order to build up good will and influence with that candidate. In the initiative context, however, there would be no comparable incentive for big money to donate as opposed to engaging in direct expenditures.

•*Expenditure Limits.* Given the difficulties of contribution limits, a campaign finance reform based on limits would require some kind of expenditure ceiling. This would be a more dramatic departure from the current regime. While contribution limits are proscribed in ballot-proposition elections, they are permitted in candidate elections, and spending limits are generally unconstitutional.⁹³ Even if, under a reformulated constitutional doctrine, spending limits could withstand legal challenge, they would be hard to apply and enforce in the ballot-proposition setting. In the absence of candidates and parties, initiative elections are open to participation by a wide range of individuals, organizations, and groups on an ad hoc basis. Although there may be two sides to every initia-

91. See Lowenstein, *supra* note 9, at 581 n.281. Even without the incentive of campaign finance laws, ballot proposition campaigns have sometimes had more than one campaign committee on a side. See *id.* at 620.

92. Professor Lowenstein suggests that this would still be an improvement from a reform perspective because direct spending would result in greater disclosure to the voters of the source of the spending. See *id.* at 599. With this reform, a corporation or an interest group would no longer be able to use an organization with an anodyne name, like "Citizens for Good Government," to disguise its role in funding the opposition to an initiative. I suspect that Professor Lowenstein overstates the value of disclosure, in particular, the degree to which voters are influenced by their knowledge of the sources of campaign money in their voting decisions. See David W. Adamany & George E. Agree, *POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA* 83-115 (1975); Zisk, *supra* note 42, at 262.

93. The exception is *Austin's* approval of limits on spending by corporations in candidate elections.

tive, there is no one state-qualified entity on either side to make or control that side's campaign. Again, this is particularly true of the "no" side, which has no contact with the state during the process of qualifying a measure for the ballot. But even on the "yes" side, the right to campaign for the proposition is not limited to the group that initially sought to place the measure on the ballot.

The absence of a single, official campaign committee—equivalent to a candidate or party—for each side in an initiative election will make policing spending ceilings far more difficult. In effect, all ballot proposition spenders are functionally equivalent to independent committees in the candidate-election context. In the absence of a candidate, it might not be clear which is the principal committee coordinating campaign activity. Spending caps that apply to individual committees would just create an incentive to create multiple committees. The wealthiest individuals or groups with a stake in the election would be the ones most able to form separate committees or spend directly. Therefore, in candidate elections, a candidate or party might discourage independent committees in order to maintain central control over the campaign's message, but there would be no comparable central entity in initiative elections. Moreover, multiple committees, with multiple arguments, might be helpful, particularly for those on the "no" side, in giving voters a range of reasons for making up their minds.

Thus, spending limits would have to apply not only to individual committees but to all spending on each side of an initiative campaign. This might mean that if there is a proposition for which different groups have different reasons for taking the same position—and each wants to get its distinct position to the voters—spending by those who got their message out early could result in other groups being barred from speaking. This is a potentially troublesome result from a free speech perspective.⁹⁴ More practically, spending ceilings would require vigilant monitoring by election administrators who would need to keep a running tally of all expenditures from multiple committees on each side.

The difficulty of imposing and enforcing contribution and expenditure limits on multiple committees on the same side of a ballot proposition election may be compounded when there is more than one proposition dealing with the same issue on a particular ballot. This already is a common phenomenon. California has had

94. Cf. Robyn R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 438 (1993) (noting that the existence of multiple viewpoints on each side occasionally posed problems for broadcasters subject to the Fairness Doctrine).

elections in which, in a given year, there were five competing propositions dealing with insurance reform;⁹⁵ or two propositions offering different methods of regulating health maintenance organizations;⁹⁶ or even two conflicting proposals for campaign finance reform.⁹⁷ This has occurred in other states as well.⁹⁸ Interest groups often use competing propositions strategically not just to offer the voters alternatives that the particular interest group finds more appealing than the initial proposition, but also to distract or confuse the electorate or to tacitly undo a popular initiative.⁹⁹ A spending cap could provide an additional strategic incentive to qualify competing initiatives, since each initiative would presumably be subject to a separate spending limit.¹⁰⁰

Again, this is a tactic most available to the wealthiest interest groups. A group opposed to Proposition 1 could qualify Propositions 2 and 3, and thereby triple the amount of money it could spend on the subject common to the three propositions. Presumably only one-third of the expenditures for ads calling for "no" on "1" and "yes" on "2" and "3" would count towards the cap on Proposition 1, even though the purpose of the entire campaign would be to defeat Proposition 1. Similarly, an ad addressed to one proposition could have an effect on voter attitudes toward a competing proposition, yet it might not count toward the spending cap on the second proposition.

95. See Bill Zimmerman, *Insurance Referendum: \$60 Million War in California*, NATION, Nov. 7, 1988 at 449; Kenneth Reich, *Consumer Groups Back Props. 100, 103*, L.A. TIMES, Oct. 25, 1988, at 25.

96. See Nicolosi, *supra* note 82, at A22.

97. See *Comparing the Initiatives*, L.A. TIMES, May 24, 1988, at Part 2, at 4.

98. See ZISK, *supra* note 42, at 71 (describing three competing tax reduction measures on the 1978 Michigan ballot).

99. See, e.g., Eule, *supra* note 58, at 1517; Polashuk, *supra* note 94, at 410 n.111.

100. To qualify for the ballot, a proposition needs to get signatures from some percentage of the state's electorate. In large states this "is mostly a commercial venture" involving the use of paid solicitors who are compensated on a per signature basis. In smaller states, signature-gathering may succeed as an "amateur enterprise." Collins and Oesterle, *supra* note 47, at 70-71. Wealthy interests are likely to find it particularly easy to qualify strategic initiatives in smaller states. "Currently, a single citizen with an extra \$40,000, fifty cents a signature for eighty thousand signatures, has a good chance of putting an initiative on the [Colorado] state-wide ballot using paid solicitors." *Id.* at 75. The ability of wealthy interests to qualify their ballot propositions is, thus, aided by the Supreme Court's invalidation of the restriction on the use of paid solicitors. See *Meyer v. Grant*, 486 U.S. 414 (1988).

A candidate's strategic support of additional candidates is relatively rare—perhaps because candidates are concerned that the diversionary candidate might win, or, if the additional candidate is too weak to win, because the tactic would seem too transparent to succeed. In the ballot proposition context, however, supporters of additional initiatives might be quite happy if their diversionary measures passed. Moreover, multiple initiatives might be less open to charges of strategic manipulation because each measure would technically stand or fall in a separate election, and because each would present a slightly different regulatory alternative to the voters.

•*Public Funding.* With spending caps difficult to enforce, an alternative means of promoting equalization in initiative elections is public funding. Public funding assures each side in an election a basic level of support for getting its message out, and thereby reduces the significance of private funding inequalities. As a strategy for leveling up rather than leveling down, public funding is compatible with current constitutional doctrine.¹⁰¹ Moreover, the provision of public funds can be an incentive to get candidates to agree to expenditure limits. In federal elections, public funding is available for qualifying candidates in the presidential primaries and for the general election. In the primaries, funds are provided on a matching basis; for a candidate who raises a certain threshold amount of money, the federal government will match a portion of the additional funds the candidate raises privately.¹⁰² In the general election, the candidates of the major parties receive a large, flat grant and are required to forego the use of private donations.¹⁰³ For both primaries and general elections, public funds are contingent on a candidate's acceptance of spending limits.

101. See *Buckley v. Valeo*, 424 U.S. 1 at 85-109.

102. Presidential primary matching funds are available for candidates who raise \$5,000 in each of twenty states in contributions from individuals of \$250 or less. The federal government matches each contribution to qualified candidates from individuals up to \$250 per contributor. Candidates who agree to accept matching funds are also subject to spending limitations. See ALEXANDER & CORRADO, *supra* note 11, at 18. A candidate who does poorly in consecutive primary elections may cease to be eligible for public funds. See 26 U.S.C. § 9033 (1994).

103. A major party is defined as a party whose candidate for president received 25% or more of the popular vote in the last presidential election. See 26 U.S.C. § 9002(6) (1994). A candidate of a party that received 5% but less than 25% of the vote in the last presidential election receives a fraction of the major party grant based on how close to 25% of the vote that party received. See 26 U.S.C. §§ 9002(7), 9004(a)(2) (1994). Again, to be eligible this candidate also has to agree to abide by spending limits. See 26 U.S.C. § 9003 (1994).

The absence of ballot-qualified candidates and parties makes it more difficult to implement a public funding scheme for initiatives. Again, there is the question of who is to receive the public funds, particularly on the "no" side. Presumably, some state agency would have to make a determination, pursuant to some statutory criteria, as to which "no" committee is to receive the "no" money. A basic question is whether public funds would be provided to one committee on each side—presumably the committee that demonstrates the most popular support¹⁰⁴—or to all committees whose support crosses a certain threshold. If the former, then the state would be in the unattractive position of anointing the official opposition without benefit of a "primary" election or some other prior electoral qualification of the organization. Although state officials in states with voter handbooks may choose which organization or organizations supply the arguments to be included in the handbook, state designation of an official opposition gives the state a much greater role in structuring initiative elections than has traditionally been the case.¹⁰⁵ Moreover, if the state funds just one committee, then public funding could not be used to support spending limits, since other committees on each side would be free to raise and spend money. If public funds are provided to more than one committee on a side, on some kind of matching basis, as in the presidential primary system, it would be much harder to assure parity of funding for the two sides, and the side with greater qualifying private support might also receive more public funds.

In calling for public funding of initiative campaigns, Professor Lowenstein has contended that "the administrative problems are real, but they can be overcome."¹⁰⁶ Nevertheless, public funding is less likely to achieve equalization in the initiative setting because

104. In the absence of an election to choose a "no" committee, the most plausible way of determining which has the most support is by looking at the donations the committees have received, possibly giving weight to the number of donors as well as to the amounts donated.

105. When the Fairness Doctrine was adopted—requiring broadcasters to provide both sides in an initiative election with a reasonable opportunity to present their views, including free time to the side that could not afford it if the broadcaster accepted paid ads from the other side—broadcasters were free to choose which viewpoints would be presented and who would present them. See Polashuk, *supra* note 94, at 396-97 & 442 n.25.

106. Lowenstein, *supra* note 9, at 583. He would authorize the legal proponent of the initiative to determine who receives the "yes" funds and have the state designate the "no" committee that was most successful in raising private funds as the recipient of the public "no" money. See *id.* at 581-83. See also Polashuk, *supra* note 94, at 439 (proposing to authorize an administrative agency to determine who would receive free broadcasting time under a revived Fairness Doctrine).

the possibility of multiple committees makes it more difficult to use public funds as an incentive for the acceptance of spending limits. In addition, the likely use of a matching funds model assures a role for private funding. Funding just one committee on each side could permit equal subsidies for the two sides but would put the state in the unusual and potentially awkward role of designating the official opposition. Even then, the provision of public funds to one committee could not limit the ability of other committees working independently on the same side to raise and spend private funds.¹⁰⁷

An alternative form of public funding, not adopted in any jurisdiction, is vouchers—the provision of an equal sum of money or coupons to each voter—that could only be used to fund political activity.¹⁰⁸ Vouchers would avoid the necessity of state designation of official campaign committees; in that sense, they are more consistent with the open, unstructured nature of initiative elections than public grants to campaign committees. Yet vouchers present their own difficulties. The size of an election voucher would presumably be based, in part, on the number of contests in an election campaign. Whereas the number of elective offices to be filled is usually relatively small and quite predictable, any number of initiatives can be proposed and qualified for the ballot. Adapting the voucher system to direct democracy would require the size of the voucher to rise and fall with an ever-shifting number of ballot propositions.

Vouchers, like matching grants, would be better at equalizing voter influence over electoral outcomes than assuring equal spending on both sides of an initiative campaign. The position benefiting from more widespread or intense support at the outset of the campaign would receive more funding. It appears that it will be quite difficult to achieve both strands of equalization—equal spending on an issue and equal voter influence over electoral outcome—in the direct democracy setting.¹⁰⁹

107. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1984).

108. See, e.g., Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996).

109. Reliance on vouchers also raises questions concerning the solicitation of voters for their vouchers. There has to be some campaigning in order to inform the voters who the candidates are and what the ballot propositions contain, and then to persuade voters to donate their vouchers to a particular side. Presumably campaigning for vouchers will entail the use of some private funds.

IV. CONCLUSION

The difficulties of reforming campaign finance in initiative elections tell us a little bit about both initiatives and campaign finance. With respect to initiatives, the hallmark of direct democracy—the absence of a role for candidates and parties—may be an Achilles' heel when it comes to justifying and implementing reforms. Under current doctrine, the most effective justification for restrictions on the use of private funds in campaigns is the prevention of the corruption of candidates. But in the direct democracy context, there are no candidates. Even if doctrine were to change to permit regulation that would promote equalization, the open-ended nature of initiative campaigns and the central role of private individuals and ad hoc organizations would make it more difficult to enforce restrictions. The absence of ballot-qualified candidates and parties and the absence of electoral institutions for determining who controls a ballot-proposition campaign would also make it more difficult to select the recipients of public funds or to use public funding as a means of equalizing campaign spending.¹¹⁰

The difficulties in adapting campaign finance reform to initiatives may also tell us something about the difficulties of promoting political equality in a relatively open political system. The two strands of equality—equality of spending and equality of influence—may not both be achievable unless there are some restrictions on who can participate in the electoral process. Only in a system of equal government grants to electoral antagonists, with private spending proscribed, can both goals be achieved: in such a system both sides would be equally funded, and use of the public fisc would eliminate the possibility of unequal private influence. In the initiative setting, this would involve both government designation of campaign committees and a prohibition on spending by other committees. Currently, the latter would be unconstitutional, and the former might be awkward in light of the traditionally open-ended nature of direct democracy.

The initiative example also suggests something about the difficulty of achieving both strands of equality in the candidate-election context. The more the electoral system is open to participation, the more difficult equalization will be to achieve. Public funding can

110. Other reforms, such as those that would reduce the cost of campaign communications by requiring broadcasters to sell ads at lower rates, would not appear to encounter any special problems in the initiative settings. However such reforms would probably have a more modest effect in promoting equality.

be provided to ballot-qualified candidates or parties, as in the presidential general election. But unless limits are placed on the electoral activities of committees, organizations, and individuals that act independently of candidates, both equality of spending and equality of influence can be subverted. In fact, it is likely to be particularly difficult to persuade the Supreme Court to accept limits on independent spending—the element of candidate elections that most resembles initiative elections. Moreover, public funding through flat, equal grants to candidates is really only plausible for elections structured by major parties with proven records of support. In the absence of something like a major party nomination process which demonstrates that a candidate has a high level of support at the beginning of a campaign, public funds are likely to be on a matching grant or voucher basis. Indeed, the more we want to encourage openness—through the use of primaries to select party nominees, and by easing access to the ballot for third-party and independent candidates—the more likely public-campaign funding will turn on the candidates' ability to draw support. Matching funds or vouchers may promote equality of influence, but they will not lead to equal spending as long as there are differences in the initial level of support for different sides in an election.

The difficulties of campaign reform for initiatives—the electoral mechanism most open to participation—are merely an extreme case of the general problem of financing campaigns in a political system relatively open to participation by people and interests other than professional politicians and parties. They also demonstrate that in a large and complex society, in which communication with the electorate is costly and requires considerable resources but in which those resources are distributed in dramatically unequal ways, a relatively open political structure need not result in redistributive public policies.